PERSONAL GUARANTEES: RECENT CASES SETTING DANGEROUS PRECEDENT

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I. INTRODUCTION

Imagine you are the owner of a used car lot, making a living by selling automobiles to consumers with bad or marginal credit, then forced out of business because you can no longer enforce a third party personal guarantee. Or a young entrepreneur with an idea for a new product or service who cannot secure financing because you do not have sufficient assets or business history to secure a commercial loan on your own. Perhaps worst of all, consider the inability to afford college tuition due to stratospheric interest rates on student loans because a parent's cosignature on the loan is worthless to the lender.[1] All of these situations could come to pass if a recent Massachusetts Appellate Court decision[2] gains traction. The court in *Yellow Book, Inc. v. Tocci* held that a personal guarantee, signed by office employee Lisa Tocci, failed for lack of consideration to the guarantor and declined to enforce the guarantee against her.[3] While it is understandable to be sympathetic to Ms. Tocci's predicament as a mere employee forced to pay her employer's business expenses, this decision turns the black letter law of consideration for personal guarantees on its head.[4] Traditionally, "consideration supporting the underlying obligation also supports the

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[1] *Important Things to Know When Considering A Cosigner*, SALLIE MAE, https://www.salliemae.com/student-loans/loan-servicing/cosigning/ (last visited Apr. 04, 2015) (explaining that having a qualified cosigner on a student loan increases availability and lowers interest rates).

[2] Yellow Book, Inc. v. Tocci, No. 13–ADMS–10026, 2014 Mass. App. Div. 20 (App. Div. N.D. Mass. Feb. 21, 2014).

[3] *Id.* at 23.

[4] *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 9 (1996); *see also id.* § 9 cmt.a:

> Cases recognizing that the consideration supporting the underlying obligation also supports the secondary obligation include Vanek v. Indiana Nat'l Bank, 540 N.E.2d 81 (Ind.App.1989), affirmed, 551 N.E.2d 1134 (Ind.1990); Public Loan Co. v. F.D.I.C., 803 F.2d 82 (3d Cir.1986); Superior Wire & Paper Products, Ltd. v. Talcott Tool & Mach., Inc., 184 Conn. 10, 441 A.2d 43 (1981); Moses v. Lawrence County National Bank, 149 U.S. 298, 13 S.Ct. 900, 37 L.Ed. 743 (1893). See L. Simpson, Handbook on the Law of Suretyship § 26, at 74-79 (1950); A. Stearns, The Law of Suretyship § 4.9, at 71 (J. Elder rev., 5th ed. 1951). Statutes include Cal. Civ. Code § 2792; S. Dak. C. L. § 56-1-3.

secondary obligation."[5] It does not matter who provides the consideration to the promisor; it can be the promisee or a third party.[6] Per the Restatement (Third) of Suretyship and Guaranty § 9 on consideration, the requirement of consideration for a personal guarantee is the same as the traditional requirement under basic contract law, except:

> (2) A secondary obligation does not fail for lack of consideration if:
> (a) the underlying obligation is supported by consideration and the later creation of the secondary obligation was part of the exchange for which the obligee bargained; or
> (b) the promise of the secondary obligor is in writing and signed by the secondary obligor and recites a nominal purported consideration; or
> (c) the promise of the secondary obligor is made binding by statute; or
> (d) the secondary obligor should reasonably expect its promise to induce action or forbearance of a substantial character on the part of the obligee or a third person, and the promise does induce such action or forbearance.[7]

Essentially, this means that consideration for the guarantee need not flow to the guarantor; it is instead derived from what the primary obligor received. The *Tocci* decision, in holding that the guarantee fails for lack of consideration, breaks from this by finding that the secondary obligor must receive consideration directly.

The potential implications of this rogue decision reach beyond those situations where a third party provides a more or less donative guarantee. It is not hard to imagine this decision as a threat to enforcement of personal guarantees in general. Building on the "logic" of the *Tocci* decision, since a corporation is a separate legal entity from its human owner(s),[8] it seems not a stretch to argue to that a director or shareholder does not directly derive any consideration from a personal guarantee of a corporate debt, especially in a non-pass through entity such as a subchapter "C" corporation. Even if *Tocci*'s potential progeny only led to non-enforcement of purely donative guarantees, this would represent a threat to the liquidity of many small businesses and to the

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[5] *Id.* § 9.
[6] United States v. Glover, 453 F. Supp. 659, 664 (W.D. Okla. 1977) (citing 17 AM. JUR. 2D *Contracts* § 94 (1964)).
[7] *See* RESTATEMENT (THIRD) OF SURETYSHIP & GUAR., *supra* note 4.
[8] *Choose Your Business Structure: Corporation*, U.S. SMALL BUS. ASS'N, https://www.sba.gov/content/corporation (last visited Apr. 04, 2015).

availability of student loans. Personal guarantees are critical to preserving access to credit for small businesses, entrepreneurs, and students.

This Note will briefly examine the history and current state of enforcement of personal guarantees, as well as what may be seen as an increasing judicial hostility toward their enforcement. It will also detail methods used by practitioners to help insure the guarantee will be upheld, and make further recommendations to ensure the enforceability of this vital link to reasonably priced credit for individuals and small businesses.

The Note will also touch on Pennsylvania's Uniform Written Obligations Act ("UWOA"), the only remaining state statute that allows a party to bind himself simply by declaring in writing that intent, eliminating the necessity of consideration to make a promise enforceable.[9] Since the subject of enforcement of donative promises and history of the English common law "seal" could easily be a note topic in and of itself, I will only briefly discuss the Act and a recent court challenge, concentrating on how the Act relates to guarantee enforcement in Pennsylvania.

Finally, this Note will suggest some steps that practitioners can take to improve the chances of a personal guarantee being enforced. These will include drafting tips, more judicious use of personal guarantees, and legislative recommendations.

II. OVERVIEW OF PERSONAL GUARANTEES OF A DEBT OR OBLIGATION.

A. What is a Personal Guarantee?

"A personal guarantee is essentially a promise or agreement to make yourself personally liable for a debt."[10] It is an unsecured written promise to be responsible for the debt of another party or entity, often seen in the context of a business owner or corporate officer in his personal capacity, guaranteeing payment of a corporate debt with the guarantor's personal assets.[11] It can enable an otherwise non-credit

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[9] W. Walter Braham, *What Should Be Done With the Common Seal in Pennsylvania?*, 36 PA. B. ASS'N Q. 355, 355–61 (1965).

[10] Baran Bulkat, *What Happens to A Personal Guarantee in Bankruptcy: Learn How to Discharge A Personal Guarantee in Bankruptcy*, ALLLAW, http://www.alllaw.com/articles/nolo/bankruptcy/personal-guarantee-bankruptcy.html (last visited Apr. 04, 2015).

[11] *See* Michael Lockwood, *When (and Why) Should You Sign a Personal Guarantee to Secure Financing?*, BPLANS, http://articles.bplans.com/personal-guarantees-to-secure-financing/ (last visited Apr. 04, 2015).

worthy individual or business to obtain financing.[12] "[A] guarantor enters into a cumulative collateral engagement, by which he agrees, that his principal is able to and will perform a contract which he has made or is about to make, and that if he defaults the guarantor will, upon being notified thereof, pay the resulting damages."[13] A personal guarantee is commonly used in situations where the primary obligor has insufficient assets and/or poor credit history (such as a fledgling business owner or a student) but wants to obtain credit. [14] Without the guarantee, many banks will simply refuse to lend the funds.[15]

In this Note, the use of the term "guarantee" should be interpreted to encompass situations where the term "surety" is used. Traditionally, a surety referred to a primary obligation, whereas a guarantee was a secondary obligation, coming due only upon the default of the principal obligor.[16] Today, the terms are more commonly used interchangeably as they are "unusually intertwined in legal parlance and that the distinctions between them are arcane and often ignored."[17] It appears that any distinction between the two terms may be fading.[18]

B. History of Personal Guarantees

1. Basic Contours of a Guarantee

Personal guarantees have been part of the business landscape of this country since its founding, with reported decisions as far back as the early nineteenth century.[19] Even in those early cases, the basic contours of a personal guarantee were very familiar: if the principal did not pay, then the guarantor was liable.[20] "The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity."[21]

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[12] Braham, *supra* note 9.
[13] JPMorgan Chase Bank v. Earth Foods, Inc., 939 N.E.2d 487, 495 (Ill. 2010).
[14] Braham, *supra* note 9.
[15] *See Personal Guarantees*, INSIDEBANKING, http://www.insidebanking.net/personal-guarantees.html (last visited Apr. 04, 2015).
[16] *Earth Foods, Inc.*, 939 N.E.2d at 498.
[17] Kenneth J. Ashman & Bardia Fard, *You Say Tomato, I Say Tomahto: Court Holds Illinois Sureties Act Applicable to Guarantors*, A.B.A. L. TRENDS & NEWS (Amer. B. Ass'n, Chicago, I.L.), Winter 2010 (quoting JP Morgan Chase Bank v. Earth Foods, Inc., 898 N.E.2d 718 (Ill. Ct. App. 2008) (holding that a "sureties act" applied to guarantors))).
[18] *Id.*
[19] *See* Lawrence v. McCalmont, 43 U.S. 426 (1844); Reynolds v. Douglass, 37 U.S. 497 (1838); Wildes v. Savage, 29 F.Cas. 1226 (C.C.D. Mass. 1839).
[20] *Wildes*, 29 F.Cas. at 1226.
[21] *Reynolds*, 37 U.S. at 498.

2. Nominal Consideration

A common guarantee provision is the listing of nominal consideration to the guarantor.[22] Historically, contracts listing even nominal consideration have been upheld, regardless of the consideration's value or whether it actually changed hands.[23] For example:

> "In consideration of Messrs. J. and A. Lawrence having a credit with your house, and in further consideration of $1 paid me by yourselves, receipt of which I hereby acknowledge, I engage to you that they shall fulfil [sic] the engagements they have made and shall make with you, for meeting and reimbursing the payments which you may assume under such credit at their request, together with your charges; and I guaranty you from all payments and damages by reason of their default. You are to consider this as a standing and continuing guarantee, without the necessity of your apprizing me, from time to time, of your engagements and advances for their house; and in case of a change of partners in your firm or theirs, the guarantee is to apply and continue to transactions afterwards, between the firms as changed, until notified by me to the contrary."[24]

This "fiction" continues today, with consideration still a fundamental requirement of a contract, "but nominal consideration will suffice to support a contract" without inquiry into the adequacy of the consideration.[25]

3. Regulation B

Regulation B was promulgated by the Federal Reserve Board as part of the Equal Credit Opportunity Act of 1974.[26] It was enacted to assure equal access to credit for all creditworthy borrowers, regardless of race, gender, or marital status.[27] In Section 202.7, it also prohibits requiring a personal guarantor, if the primary obligee meets the lender's creditworthiness standards for the credit requested.[28] Generally, a lender

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[22] *Wildes*, 29 F.Cas. at 1226; *Lawrence*, 43 U.S. at 426 .
[23] Robert W. Stetson, *Four Tips for Drafting Enforceable Personal Guarantees*, BLOOMBERG LAW (May 2, 2014), http://www.bna.com/four-tips-drafting-n17179890142.
[24] *Lawrence*, 43 U.S. at 426 (quoting language of a personal guarantee that was upheld).
[25] Memorylink Corp. v. Motorola Solutions, Inc., 773 F.3d 1266, 1270–71 (Fed. Cir. 2014).
[26] U.S. FED. RESERVE, CONSUMER COMPLIANCE HANDBOOK: FAIR LENDING REGULATIONS AND STATUTES: REGULATION B (EQUAL CREDIT OPPORTUNITY) 1 (2014).
[27] *Id.*
[28] *Id.* at 3.

may not, as a matter of course, require a spouse's signature to guarantee an obligation unless the spouse's individual income or assets are being relied upon to support the decision to grant credit.[29]

4. Recent Rise in Use of Personal Guarantees by Creditors

The prevalence of a personal guarantee requirement ramped up in the late 1980s and early 1990s, primarily due to a spike in bank failures.[30] Noting that banks had incurred significant losses from non-recourse loans to business borrowers, banking regulators adopted rules requiring personal guarantees from any shareholder with a twenty percent or greater ownership stake.[31] This was also picked up by most private lenders, and has become the *de facto* industry standard, making it virtually impossible for a small business to obtain credit without a personal guarantee of the corporate obligation.[32]

C. Black Letter Law of Personal Guarantees

The general black letter law in this area is thoroughly set forth in *Paul Revere Protective Life Ins. Co. v. Weis*.[33] This case concerned enforcement of a personal guarantee of railroad car leases.[34] The cars were leased by S&R Boxcar Company, a limited partnership in which Sigfried and Robert F. Weis were limited partners.[35] The Weises personally guaranteed the payment of promissory notes due to the lessor, Girard Leasing, and then to its successor, the Paul Revere Company.[36] Terms of the guarantee were as follows:

> The undersigned *absolutely*, *unconditionally* and *irrevocably* guarantees the due and punctual payment when due of all of the Maker's obligations and liabilities to the Investors under the Maker's promissory notes . . . . dated June 1, 1979 . . . The Guarantor's obligations hereunder shall be direct, absolute and unconditional irrespective of (i) the legality, validity or enforceability of the Notes.[37]

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[29] *Id.* at 1–3.
[30] Sam Thacker, *Personal Guarantees Required in Small Business Loans*, ALLBUSINESS, http://www.allbusiness.com/technology/software-services-applications-markup/10753236-1.html, (accessed November 4, 2014)
[31] *Id.*
[32] *Id.*
[33] 535 F. Supp. 379 (E.D. Pa. 1981), *aff'd*, 707 F.2d 1403, 1405 (3d Cir. 1982).
[34] *Id.* at 381.
[35] *Id.* at 381–82.
[36] *Id.* at 382.
[37] *Id.* at 382–83 (emphasis in original).

S&R ran into financial difficulties due to a general economic slowdown and ceased making payments on the notes, prompting the Paul Revere Company to file an action against the Weises, bypassing the primary obligor, S&R, altogether.[38] Paul Revere Company also made no attempt to repossess or liquidate the collateral (boxcars).[39] In this case the court noted that:

> [First,] [i]t is well established that when, as in this case, the guaranty is an absolute or unconditional one and the creditor has other security he need not proceed against the security, but may at once sue the guarantor on the default of the principal debtor . . .
> [Second,] to have an enforceable guaranty contract, it is not necessary that consideration pass directly to the surety; the extension of credit to the principal debtor is sufficient consideration for the promise of the surety . . .
> [Third,] [t]he reliance by the plaintiffs on the guarantees submitted by defendants supplies the necessary consideration to support the guarantees.[40]

The key to this court's holding was its treatment of consideration. The basic contract principle of requiring consideration for such a promise was dealt with in different ways, including flowing from the grant of credit to the principal or coming from the detriment suffered by the creditor in granting the credit; nothing need flow directly to the guarantor for the guarantee to be upheld.[41] Also set forth is the principle that once a default occurs, the beneficiary of the guarantee need not proceed after the primary obligor, mitigate damages, or take action against any collateral prior to proceeding against the guarantor.[42] Until recently, these principles appeared well established, however recent decisions, discussed below in Section IV, call into question these long held maxims.

The court gives an additional reason for its holding, noting that per Pennsylvania statute, a written statement by which the signer states his "intention to be legally bound" is enforceable regardless of whether or not there is any consideration for that promise.[43] Further discussion of the Pennsylvania Uniform Written Obligations Act follows in Section VI.

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[38] *Id.* at 383.
[39] *Id.*
[40] *Id.* at 384–86.
[41] *See id.*
[42] *Id.*
[43] *Id.* at 386.

III. THE IMPORTANCE OF PERSONAL GUARANTEES

A. Small Business Lending

One of the more common and important uses of personal guarantees is in small business lending.[44] Personal guarantees are critical to obtaining reasonably priced small business financing. Banks are demanding more personal guarantees than ever.[45] In fact, "the overwhelming majority of loans to closely held companies require the personal guarantee of the owner."[46] Often, small business owners' "personal finances are intertwined with the business," necessitating the personal obligation in addition to the corporate responsibility.[47] Further, it signifies to the parties the serious nature of the obligation, in that the obligor is putting his money where his mouth is.[48] "The personal guarantee demonstrates management and ownership commitment to the business venture, even if the guarantor's personal resources are insufficient to support the obligation."[49] After all, "if the owner isn't willing to stand behind the business, then why should the lessor or lender take a risk?"[50]

B. Franchise Agreements

Personal guarantees are almost always required in franchise agreements, one of the more popular ways of starting a small business.[51] The franchisor relies on that agreement as backup for royalty and advertising payments from the franchisee corporation, as well as any judgments resulting from disclosure of trade secrets, abuse of trademarks or violations of a non-compete agreement.[52] If guarantees were unenforceable, franchisors would likely require larger upfront payments before exposing their proprietary materials and providing

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[44] *See* Sam Thacker, *Personal Guarantees Required in Small Business Loans*, ALLBUSINESS, http://www.allbusiness.com/technology/software-services-applications-markup/10753236-1.html (last visited Apr. 04, 2015).

[45] Laura Walters, *Banks Expect Personal Guarantees from SMEs*, STUFF (Jan. 30, 2014, 5:00 AM), http://www.stuff.co.nz/business/small-business/9664238/Banks-expect-personal-guarantees-from-SMEs.

[46] Lawrence Gardner, *Getting Personal: What If the Banker Needs a Loan Guarantee Beyond the Assets of the Business?*, 6 BUS. L. TODAY 43, 43 (1997).

[47] Lockwood, *supra* note 11.

[48] *See id.*

[49] *Personal Guarantees*, *supra* note 15.

[50] Lockwood, *supra* note 47.

[51] Ed Teixeira, *The Franchise Contract: Understanding the Personal Guaranty*, FRANCHISEKNOWHOW, http://www.franchiseknowhow.com/legal_corner/personalguaranty.htm (last visited Apr. 04, 2015).

[52] *Id.*

services to a franchisee corporation with few hard assets. Without being able to go after the principals' personal assets in case of a default, franchise agreements could be so expensive as to be out of reach of the small entrepreneur.

C. Commercial Leases

The typical small business commercial lease also relies on a personal guarantee from the shareholders.[53] Ever since the 2008 financial crisis and subsequent commercial real estate collapse, landlords are increasingly requiring personal guarantees, "even if you have a strong record of repayment and your business is in the black."[54] In addition, lower risk of loss to the creditor can mean lower rents, better lease terms, or smaller security deposits on commercial leasing obligations.[55]

D. Student Loans

The inflation-adjusted published price of college tuition and fees has doubled over the last twenty years.[56] With little or no credit history, many students would find it difficult to qualify for student loans without a cosigner.[57] Even if she could qualify on her own, a student often gets a significantly better interest rate with a guarantor than without.[58] With the high debt load that many students are forced to carry to finance their education, even a small reduction in the interest rate can save thousands over the term of the loan.[59] Since no one but the student herself receives a benefit from the credit, secondary guarantees for student loans (especially private loans) would seem to be particularly ripe for non-enforcement due to the purely donative nature of the obligation.

IV. COURT DECISIONS THAT THREATEN ENFORCEMENT OF PERSONAL GUARANTEES

In recent years, there seems to be a growing judicial hostility to personal guarantees of corporate obligations, especially where their

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[53] *See, e.g., id.*

[54] Marshall Lee, *Getting A Commercial Lease – Without Signing A Personal Guarantee*, THESELFEMPLOYED (Aug. 01, 2012), http://theselfemployed.com/law/getting-a-commercial-lease-without-signing-a-personal-guarantee/.

[55] *See id.*

[56] *See* COLLEGEBOARD, TRENDS IN COLLEGE PRICING 2014 p. 7 (2015).

[57] *Important Things to Know*, *supra* note 1.

[58] *Id.*

[59] *See The Importance of Student Loans*, C. FINANCING GROUP, http://www.collegefinancinggroup.com/the-importance-of-student-loans/ (last visited Apr. 04, 2015).

enforcement would result in an outcome that could be seen as unjust or unfair. With the notable exception of the *Tocci* case, this tends to manifest itself in situations where the contract drafter has not dotted his i's or crossed his t's and where the case law in a particular jurisdiction is unsettled as to what type of disclosure or signature form will suffice to show clear intent to bind oneself both personally and as a corporate representative.

A. Lack of Consideration

In the following two cases, it seems as if the creditors did everything possible to alert the cosignors that they were binding themselves both in the corporate capacity and personally, but to no avail. Both required signatures in more than one place. Yet in both cases, the cosignors claimed that they either didn't read the documents or were unaware that they were binding themselves personally, and were released from the obligation. These opinions either allude to, or state outright, that a lack of consideration to the guarantor was a reason for the holding.

In *Cummings Properties v. Aspeon Solutions, Inc.*, a 2008 Massachusetts appellate court decision, Theodore Mountzuris, a corporate officer of a co-subsidiary of the defendant corporation, and supposedly a sophisticated businessman, was not held individually liable for a guarantee that he signed.[60] Mr. Mountzuris, who had been personally involved in the negotiations with Cummings for Aspeon Solutions' office space, signed a commercial lease as a representative of Aspeon in two places—one labeled LESSEE and one labeled GUARANTY—without reading the document, as he was in a hurry to catch a flight.[61] The trial court's finding for Mountzuris was upheld, with the appellate court stating that the defendant, "had good reason to believe from the whole course of negotiations that he was not signing a guaranty in his personal capacity," and that "[n]o one in his position would have put hundreds of thousands of dollars of his own money on the line for a company in which he had no stake."[62] The appeals court concluded that, "[a] careful reading of the lease would not have alerted Mountzuris that he was giving a personal guaranty," notwithstanding the fact that the text of the personal guarantee immediately preceded the signature line labeled GUARANTY.[63] The court also alluded to the possibility that the guarantee may not have been part of the bargain, in

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[60] Cummings Props. v. Aspeon Solutions, Inc., 898 N.E.2d 889 (Mass. App. Ct. Dec. 31, 2008).
Apr. 30, 2007.
[61] *Id.* at *1–*2.
[62] *Id.* at *2.
[63] *Id.* at *2.

that Cummings does not always require personal guarantees on its leases.[64]

In *Yellow Book v. Tocci*, a 2014 Massachusetts appellate court decision, the court overturned a trial court decision holding an office manager personally liable for an advertising contract signed on behalf of her employer.[65] Ms. Tocci signed advertising contracts with Yellow Book as a representative of her employer, Pro Insulators.[66] Underneath the signature line, in boldface type was "'Authorized Signature Individually and for the Customer' or 'for the Company.'"[67] Following the boldface type, there was reference to two explanations of the guarantee, printed on the reverse of the document. The first of the two stated that "[t]he signer of this agreement does, by his execution personally and individually undertake and assume and [sic] the full performance hereof including payments of amounts due hereunder."[68] The other continued:

> The signer agrees that he/she has the authority and is signing this agreement (1) in his/her individual capacity, (2) as a representative of the Customer, and (3) as a representative of the entity identified in the advertisement or for whose benefit the advertisement is being purchased (if the entity identified in the advertisement is not the same as the Customer or the signer). By his/her execution of this agreement, the signer personally and individually undertakes and assumes, jointly and severally with the Customer, the full performance of this agreement, including payment of amounts due hereunder.[69]

Claiming that she did not see that she was signing as a personal guarantor, was not an owner or corporate officer (even though she once placed the initials V.P. after her signature) and as such did not receive a personal benefit from the advertising, Ms. Tocci disclaimed personal responsibility for the contracts.[70] The trial court granted Yellow Book's motion for summary judgment, holding that, "the terms of the contracts were unambiguous and that the signature line on each cautioned the

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[64] *See* Cummings Props. v. Aspeon Solutions, Inc., 2007 Mass. App. Div. 50, 51 (Mass. App. Div. 2007).
[65] Yellow Book, Inc. v. Tocci, No. 13–ADMS–10026, 2014 Mass. App. Div. 20, 22 (App. Div. N.D. Mass. Feb. 21, 2014).
[66] *Id.* at 20.
[67] *Id.* at 21 (quoting the text of the contract).
[68] *Id.*
[69] *Id.*
[70] *Id.* at 20–21.

signer to read the provision on the back regarding personal liability," and found Ms. Tocci liable for the contracts.[71]

The appellate court overturned the ruling and granted summary judgment to Ms. Tocci, holding that the guarantee failed due to *lack of consideration.*[72] After a recitation of the basic doctrine of consideration in contract law, Justice Swan stated that an owner or principal of Pro Insulators would have received a benefit from the contract, and as such, would have received consideration, but "a mere salaried employee" such as Ms. Tocci would not.[73] The court managed to excuse Ms. Tocci from the obligation, even while noting that, "by her signature, Tocci promised to be individually liable for Pro Insulator's debt," and stating that, "misreading or failing to read the agreements is no defense."[74] This decision is a clear break from earlier rulings in similarly situated courts in other jurisdictions.[75]

B. Two Signatures Required

There seems to be some disagreement among courts as to what is necessary to demonstrate the intent to bind oneself both as a representative of the corporation and in a personal capacity. These next few cases all deal with this by requiring two separate signatures, one in the signer's corporate capacity, and one in her personal capacity. Several courts have wrestled with this question, with differing results. One of the earlier cases in which the lack of two separate signatures was given as a reason for non-enforcement of a guarantee was *Salzman Sign Company v. Beck.*[76]

In *Salzman*, a 1961 New York Court of Appeals decision, where the court upheld a ruling that declined to hold a corporate officer personally liable.[77] The contract contained the following wording: "[w]here the Purchaser is a corporation, in consideration of extending credit to it, the officer or officers signing on behalf of such corporation, hereby personally guarantee the payments hereinabove provided for."[78] Irving Beck, in signing the contract once as president of the corporation, was "acting within the scope of his authority" and thus was not liable

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[71] *Id.* at 22.
[72] *Id.* at 23.
[73] *Id.* at 22.
[74] *Id.* at 23.
[75] Hughes Supply, Inc. v. Stage 1 Mech., Inc., No. 1416, 1997 WL 282346, at *1–2 (Ohio Ct. App. May 30, 1997) (holding two office clerical workers liable for the personal guarantee they signed for benefit of the corporation, and also workers disclaimed awareness that they were binding themselves personally).
[76] Salzman Sign Co. v. Beck, 176 N.E.2d 74 (Ct. App. N.Y. 1961).
[77] *Id.* at 75.
[78] *Id.*

due to an absence of "intent to bind himself personally,"[79] and the court noted "the nearly universal practice" of having an officer sign twice "where individual responsibility is demanded."[80] This decision is frequently cited as a bellwether of New York case law on this subject.[81]

Similarly, in *Livonia Building Materials v. Harrison Construction*, a Michigan appellate court upheld a lower court directed verdict holding that a corporate officer that signed a contract only once was not personally liable.[82] The court cited a "nearly universal practice" of an officer signing "once as an officer, and again as an individual."[83] In this case, the officer, Henry Bell, signed the contract, a form titled "New Customer Credit Form and Individual Guarantee," in a space with the word "President" typed underneath.[84] Further into the document was another paragraph which contained the following statement:

> In consideration of the extension of credit, I _____, the undersigned, as officer of the above named business, or as duly authorized agent of that business, guarantee the payment to LIVONIA BUILDING MATERIALS CO., of all indebtedness of the above named business, whether heretofore or hereinafter incurred in accordance with the terms and conditions of sale and payment.[85]

The open line was left blank by Bell, and partially for that reason, the court concluded that Bell signed the document (a form with "Individual Guarantee" in the title) in his corporate capacity only.[86]

Another example, *Yellowbook Sales Distribution Co., Inc. v. M & J Commodity Brokerage Corp.* concerns a former owner who signed a guarantee and then disclaimed responsibility for the debt.[87] Michael Appel founded M & J Commodity Brokerage with his son James in 2002, but claimed "he 'divested' himself from the corporation in 2005," leaving his son in charge.[88] Notwithstanding that claim, he admitted that,

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[79] *Id.*
[80] *Id.* at 76.
[81] *See* Yellowbook Sales & Distrib. Co. v Figliolia, No. L–1692–11, 2014 WL 5285614, at *4 (N.J. Super. Ct. Law Div. Oct. 17, 2014); Yellowbook Sales Distrib. Co., Inc. v. M & J Commodity Brokerage Corp., No. CV-009977/11, 2014 WL 1757867 (N.Y. City Civ. Ct. 2014); Weiss v. Wolin, 303 N.Y.S.2d 940 (N.Y. Sup. Ct. 1969); Triangle Props. No. 7, LLC v. Il Tiramisu, Ltd., 801 N.Y.S.2d 243 (N.Y. Dist. Ct. 2005).
[82] Livonia Bldg. Materials Co. v. Harrison Constr. Co., 276 Mich. App. 514, 523–24 (2007).
[83] *Id.* at 523.
[84] *Id.* at 524.
[85] *Id.*
[86] *Id.*
[87] Yellowbook Sales Distrib. Co., Inc. v. M & J Commodity Brokerage Corp., No. CV-009977/11, 2014 WL 1757867, at *1 (N.Y. City Civ. Ct. 2014).
[88] *Id.* at *2.

"he occasionally helped out his son by answering phones and conceded that he signed contracts on behalf of the business if there was a time constraint and the son was unavailable."[89] A line above the words "Authorized Signature Individually and for the Customer" appeared to be Michael Appel's signature (with the word "owner" hand printed after it), with instructions to read the reverse of the document.[90] Two paragraphs on the reverse of the document further explained the personal guarantee.[91] The court declined to enforce the personal guarantee, noting that *Salzman* was controlling authority, stating that in order for personal liability to attach, "the officer signs twice – once as an officer and again as an individual."[92] The court was also critical of the "fragmented nature" of the personal guarantee wording, including small print, handwritten additions, and the fact that the major portion of the disclaimer was on the reverse side of the document.[93]

In *Capitol Group, Inc. v. Collier*, a Missouri Appeals Court upheld a lower court ruling that without dual signatures (corporate and personal), the document did not evince the signer's assent to be personally liable.[94] Don Collier, president of Triad Development Co., submitted a credit application to Capital Group on behalf of Triad.[95] On the second page of the application was a section containing the following language:

> In consideration of credit being extended to the above named business by Capitol Group, Inc.[,] we the undersigned, agree to be *jointly, severally, and individually responsible for the payment* of any and all goods and/or services furnished by Capitol Group to or for our business or to us individually within the terms and conditions as stated on the Capitol Group Invoice, a form of which appears above. All accounts are due and payable to the remittance address shown on the invoice. In the event the account becomes past due, a charge of 2% per month (24% per annum) shall be due and payable on all past due amounts. The undersigned agrees to pay all costs of collection, including attorney fees and court costs in addition to all other sums due.[96]

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[89] *Id.*
[90] *Id.* at *3.
[91] *Id.* at *2–*3.
[92] *Id.* at *5 (quoting Salzman Sign Co. v. Beck, 176 N.E.2d 74 (Ct. App. N.Y. 1961)).
[93] *Id.* at *4.
[94] Capitol Group, Inc. v. Collier, 365 S.W.3d 644, 650–51, 646 (Mo. Ct. App. 2012).
[95] *Id.* at 646.
[96] *Id.* at 646–47 (emphasis added).

At the bottom of that page was a signature block where Mr. Collier signed.[97] The court held that, "our courts have adopted the policy that in order to hold a corporate officer individually liable in signing a contract of guaranty . . . the officer should sign the contract twice, once in his corporate capacity and once in his individual capacity."[98] Regardless of the language contained in the contract, the court maintained that the credit application was an agreement between only two parties, Capitol Group and Triad, and did not include Mr. Collier individually.[99] The court distinguished *Collier* from a similar Missouri Appellate Western District case, *Warren Supply Co. v. Lyle's Plumbing, LLC*, which enforced a guarantee based on a credit application that contained dual signature lines and the defendant only signed one, the corporate line.[100] Amazingly, the *Collier* court indicated that the mere presence of a second signature line, *even unsigned*, "evidenced the parties' clear intent to include a personal guaranty," and that the "language clearly references two separate entities" and "expressed the guarantor's intent to incur personal[] liability."[101]

In *Yellow Book of New York v. Platt*, the Nassau County District Court, denied enforcement of a personal guarantee based on lack of two separate signatures, regardless of the fact that a higher court had recently overturned similar decisions denying guarantee enforcement based on the same single signature form.[102] The court, in justifying its decision contrary to binding precedent, seized on language from the transcript of *Yellow Book of New York v. Dimilia*,[103] where counsel for Yellow Book was asked why two separate signature lines were not used on their form contracts.[104] Counsel for Yellow Book responded: "[t]he reason why is from a commercial business practice. *Sometimes when you ask a person to sign twice, they refuse.* We're in the business of selling advertising."[105] While the court sympathized with Yellow Book's need for personal guarantees due to the nature of its clientele, it accused them of "the utilization of ambiguity and confusion" in the quest for advertising dollars.[106]

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[97] *Id.* at 647.
[98] *Id.* at 648 (internal citations omitted).
[99] *Id.* at 649.
[100] *Id.* at 649–50 (citing Warren Supply Co. v. Lyle's Plumbing, L.L.C., 74 S.W.3d 816 (Mo. Ct. App. 2002)).
[101] *Id.* at 650.
[102] Yellow Book of New York, LP. v. Platt, No. 31073/02, 2003 WL 1389103 (N.Y. D. Ct. Feb. 03, 2003) (citing Yellow Book of New York LP v. Kim, No. 2001-473 N C, 2001 WL 1700320 (Sup. Ct. N.Y. Oct. 24, 2001)).
[103] 729 N.Y.S.2d 286 (N.Y. Dist. Ct. 2001).
[104] Yellow Book of New York, LP. v. Platt, No. 31073/02, 2003 WL 1389103, at *5 (N.Y. D. Ct. Feb. 3, 2003).
[105] *Id.* at *4 (internal citations omitted).
[106] *Id.* at *6.

C. *Two Signatures Not Required*

Other cases take a somewhat opposing view in that the courts found either no ambiguity in an officer binding himself both personally and in a corporate capacity with one signature line, or at least not enough ambiguity for a summary judgment to stand. In *Yellow Book Sales and Distribution v. Valle*, the Supreme Court of Connecticut, in February 2014, reversed and remanded a grant of summary judgment that found the defendant not personally liable.[107] David Valle, president of Moving America of CT, Inc., executed one of Yellow Book Sales form contracts on behalf of the corporation, signing on a signature line with "Authorized Signature Individually and for the Company" written underneath.[108] The lower court decision, which was upheld at the appellate level, denied enforcement based on only one signature line being "ambiguous" and "unenforceable, as a matter of law."[109] In overturning that decision, the Connecticut Supreme Court held that the contract was not ambiguous on its face and that the handwritten term "President" after the signature did not create any ambiguity as to Mr. Valle himself being a party to the contract, as "other language or the general tenor of the writing indicate[d] a contrary intent."[110] The court also found that the contract "clearly expresses an intent to create a contract between three parties."[111] The court recognized that other jurisdictions determined that the same form is ambiguous, but it did not find those decisions "sufficiently persuasive."[112]

In *Yellowbook Sales v. Figliolia*, the New Jersey Superior Court Appellate Division reversed a grant of summary judgment that was based on there only being a single signature line.[113] In the district court case, the motion judge found that even though Janet Figliolia signed the advertising contract on a line that had "Authorized Signature Individually and for the Company" printed underneath the signature line, along with a reference to an explanation on the reverse, that the contracts were none the less "ambiguous" as to personal liability and, "did not clearly notify the signor that he/she was personally liable," and thus the contracts were unenforceable.[114] The New Jersey Appellate Division, in its October 2014 ruling, cited conflicting New York case

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[107] Yellow Book Sales & Distrib. Co. v. Valle, 84 A.3d 1196 (Conn. 2014).
[108] *Id.* at 1199.
[109] *Id.*
[110] *Id.* at 1202 (citing Jacobs v. Williams, 82 A.2d 202 (Conn. 1912) (internal quotations omitted)).
[111] *Id.*
[112] *Id.* at 1203 n.7.
[113] Yellowbook Sales & Distrib. Co. v Figliolia, No. L–1692–11, 2014 WL 5285614, at *4 (N.J. Super. Ct. App. Div. Law Div. Oct. 17, 2014).
[114] *Id.* at *1.

law[115] on the issue and found that there was indeed a genuine issue of material fact as to whether Ms. Figliolia intended to be held personally liable.[116] The court also criticized the motion judge's "conclusive and generic determination the Yellowbook contracts are ambiguous on their face and thus unenforceable."[117]

D. Corporate Lease Guarantees: Do They Apply to Extensions of the Lease?

The decisions below involve personal guarantees of corporate leases; two jurisdictions, with similar fact patterns, came to opposite results when determining whether the personal guarantees carry over to lease extensions. In both cases, the options for extension were provided for in the initial lease, and the language in the document exercising the option purports to incorporate all the terms of the original.

In *Fairview Realty Investors v. Seaair*, the parties entered into a five-year lease, with an option for an additional five-year term, with principals Seaair, Linda Tancek, and Fredrick Lemieux, signing in both their corporate and personal capacities.[118] After the initial term, Seaair exercised the option, entering into "an Addendum to Lease Agreement that incorporated by reference all the terms and conditions of the earlier lease."[119] The addendum only included signature lines for Tancek and Lemieux to sign in their corporate capacity.[120] Ten months later, Seaair relocated the business and sold it, telling Fairview that it would no longer make payments on the lease.[121]

When Fairview filed a complaint against Seaair and its principals, the trial court judge granted a motion to dismiss, reasoning that "the lease and extension did not contain language reflecting the intent of the parties that the guarantees . . . applied only to the original lease term, and not to any extension."[122] The judge then allowed an interlocutory appeal, with the Court of Appeals of Ohio affirming.[123] The appeals court also noted that there was no requirement of a personal guarantee in the original lease stating, "there is nothing to indicate that the personal guaranty signatures provided were anything other than voluntary"

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[115] All parties agreed that New York case law applied to this contract. The court also noted that three of four recent New York appellate opinions with the same basic facts found a triable issue of fact as to personal liability. *Id.* at *3 n.1.
[116] *Id.* at *4.
[117] *Id.*
[118] Fairview Realty Investors, Ltd. v. Seaair, Inc., No. CV-455392, 2002 WL 31771263, at *1 (Ohio Ct. App. Dec. 12, 2002).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*

(alluding to a lack of consideration for the promise).[124] Also key to its ruling was the fact that Fairview drafted the extension: "the explicit omission of any personal guaranty requirement in the document lends further support to the result we reach here."[125] Although there is authority in Ohio supporting the result here,[126] other jurisdictions have found differently.[127]

A Maine court came to the opposite result in *Handy Boat Service, Inc. v. Professional Services, Inc.*, in which Kerry Luther entered into a lease for a restaurant building with Handy Boat Service as president of his corporation, Professional Services, Inc.[128] In addition to the one-year lease, which included an option to extend the lease for three additional five-year periods, Mr. Luther signed a separate document personally guaranteeing the corporate obligation.[129] Ten months later, Professional Services exercised the initial five-year option.[130] Three years into that term, Mr. Luther established a new corporation and prior to the expiration of the lease, transferred the assets of Professional Services to the new corporation, vacating the leased premises.[131] When Handy Boat filed suit against Professional Services and Mr. Luther for unpaid rent, the trial court held that the personal guarantee applied to both the original lease and the extension.[132] The decision was upheld by the Supreme Judicial Court of Maine, stating that, "[w]hen a guarantee and contract are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, they will be construed together as one legal instrument."[133] The court reasoned that since the option to extend was in the "explicit terms of the lease," any guarantee that applied to the original lease would apply to any extensions pursuant to those terms.[134]

E. Synopsis

Overall, these cases demonstrate some of the challenges practitioners face when trying to create personal guarantees that will be enforced in a predictable manner. Whether the reason for non-enforcement is lack of consideration, lack of demonstrated intent to bind oneself both in the corporate capacity and personally, or lack of clarity

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[124] *Id.* at *2.
[125] *Id.*
[126] *See* Yearling Props. v. Tedder, 557 N.E.2d 1231, 1233–34 (Ohio Ct. App. 1988).
[127] Handy Boat Serv. v. Prof'l Servs., 711 A.2d 1306 (Me. 1998).
[128] *Id.* at 1307.
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 1308.
[134] *Id.*

regarding whether the guarantee applies to a lease extension, most issues can be avoided by careful drafting of the guarantee.[135]

V. STEPS TO HELP ENSURE ENFORCEABILITY OF PERSONAL GUARANTEES

Judicial attitudes toward personal guarantees seem to vary greatly from jurisdiction to jurisdiction. Some courts latch onto any excuse to void the guarantee, while others refuse to excuse responsibility for those individuals who take on an obligation without reading the corresponding documents. It is a well-worn maxim that businesses hate uncertainty.[136] As such, predictability in enforcement of personal guarantees is necessary for efficient pricing of credit products. As demonstrated by the conflicting judicial results discussed above, sometimes involving the same or similar documents, enforcement is far from predictable. For small businesses to obtain financing, and for mom-and-pop landlords to be able to keep rents low and still remain profitable, enforceable personal guarantees are vital. Fortunately, for the most part, they are still upheld,[137] and there are some steps that practitioners can take to make enforcement more predictable.

A. Contract Drafting Tips

First, clear disclosure of the terms is essential. Almost without fail, courts that decline to enforce a guarantee mention unclear language, miniscule print, or disclaimers printed on the reverse of a document as contributing to the holding.[138] This means practitioners should limit small print and back-of-the-page boilerplate language.

Drafters should also make a point to use separate lines for guarantor signatures in both corporate and personal capacities.[139] Several courts note the lack of two separate signatures as a source of ambiguity as to the intent to bind oneself.[140]

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[135] *See* Stetson, *supra* note 23.

[136] *See* PAUL J. H. SCHOEMAKER, PROFITING FROM UNCERTAINTY: STRATEGIES FOR SUCCEEDING NO MATTER WHAT THE FUTURE BRINGS xiv–xv (2012).

[137] *See generally* TruServ Corp. v. Flegles, Inc., 419 F.3d 584 (7th Cir. 2005); Gen. Elec. Capital Corp. v. Gainey, 562 Fed. App'x 414 (6th Cir. 2014).

[138] *See* Cummings Props. v. Aspeon Solutions, Inc., 2007 Mass. App. Div. 50, 51 (Mass. App. Div. 2007) (2007); Yellowbook Sales Distrib. Co., Inc. v. M & J Commodity Brokerage Corp., No. CV-009977/11, 2014 WL 1757867 (N.Y. City Civ. Ct. 2014); Yellow Book of New York, LP. v. Platt, No. 31073/02, 2003 WL 1389103, at *3–*4 (N.Y. D. Ct. Feb. 3, 2003).

[139] Stetson, *supra* note 23; *see also* Capitol Group, Inc. v. Collier, 365 S.W.3d 644, 649–50 (Mo. Ct. App. 2012); Livonia Bldg. Materials Co. v. Harrison Constr. Co., 742 N.W.2d 140, 146–47 (2007).

[140] *See, e.g.*, Salzman, 176 N.E.2d at 74; Livonia, 276 Mich. App. At 523; Yellowbook Sales Distrib. Co., Inc. v. M & J Commodity Brokerage Corp., 2014 WL 1757867, at *2; Capitol

Listing at least nominal consideration for the guarantor could also eliminate problems such as those seen in *Yellow Book v. Tocci*, where lack of consideration for the guarantor is cited as a reason for not enforcing the guarantee.[141] Contracts listing even nominal consideration have been upheld without inquiry into the value of the consideration, or whether it actually changed hands.[142] Even just the written statement that a party is acting "pursuant to adequate and sufficient consideration" has functioned as consideration for a guarantee.[143] "It is not a requirement of a valid contract that the consideration be spelled out in detail."[144]

Making the guarantee function as part of the exchange is critical to its enforcement. This means referencing the guarantee in the recitations as one of the reasons the grantor is offering credit, making clear that the personal guarantee is part of the bargained-for exchange.[145] Even though no consideration need flow to the guarantor directly, it still must be present.[146] If a contract would have been entered into whether or not there was a guarantee, the guarantee is void for lack of consideration.[147]

Another way to help ensure enforceability is to include a waiver of all legal and equitable defenses.[148] In drafting the personal guarantee language in this fashion, the guarantee itself can be enforced, even in a case where the underlying borrower is released from the obligation.[149]

B. Selection of Guarantors

If at all possible, the guarantor should be someone with "skin in the game."[150] This could be someone who is an officer, equity owner, or employee who benefits from a profit sharing arrangement. While this is not always possible, and there is often no way to assure that the person signing is actually a stakeholder, at least asking for the signer's title in writing or specifying a signature from a corporate officer or owner can

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Group, Inc. v. Collier, 365 S.W.3d at 646; Yellow Book of New York, LP. v. Platt, 2003 WL 1389103.

[141] Stetson, *supra* note 23.

[142] *Id.*; *see also* Lawrence v. McCalmont, 43 U.S. 426, 437 (1844) (quoting language of a personal guarantee that was upheld).

[143] Deschaine v. Central Systems, Inc., 2006 WL 1663731, No. 05-CV-388-WDS, *1 (S.D. Ill. 2006) (quoting Doc. 16, Ex. D Indemnification Agreement, Deschaine v. Central Systems, Inc., 2006 WL 1663731, No. 05-CV-388-WDS (S.D. Ill. 2006)).

[144] *Id.* at *4.

[145] *See* Fairview Realty Investors, Ltd. v. Seaair, Inc., No. 81296, 2002 WL 31771263, at *1 (Ohio Ct. App. Dec. 12, 2002) (referring to lack of evidence that guarantee was part of the bargain).

[146] FPC Financial v. Wood, No. 2006-02-005, 2007 WL731428, *2 (Ohio App. 2007).

[147] *Id.* at *2–*5.

[148] *See* Compagnie Financiere de CIC et de L'Union Europeene v. Merrill Lynch, Pierce, Fenner & Smith Inc., 232 F.3d 153, 161 (2d Cir. 2000).

[149] *Id.*

[150] *See* Yellow Book, Inc. v. Tocci, No. 13–ADMS–10026, 2014 Mass. App. Div. 20, 23 n.5 (App. Div. N.D. Mass. Feb. 21, 2014); Stetson, *supra* note 23.

increase the chances of a personal guarantee's enforcement, or in the alternative, establish a potential cause of action for misrepresentation.[151]

C. Alternatives to Personal Guarantees

Users of personal guarantees should consider whether or not they really need the guarantee in every instance, and limit its usage to only such circumstances as necessary.[152] It only makes sense that the more a provision looks like boilerplate, the less likely a court is going to see it as part of the bargained-for exchange.[153]

An alternative to personal guarantees is pledging collateral such as company stock.[154] Another option would be to require the guarantor to take out default or personal guarantee insurance.[155] This relatively new product functions much like private mortgage insurance, in that if the corporation goes bankrupt, insurance picks up the tab for the loan.[156] Availability of this product is not yet widespread, but it is available from multiple companies, including well-known firms like Crump.[157] Typically, personal guarantee insurance will pick up about seventy percent of the guarantor's liability.[158] While not actually an alternative to a personal guarantee, it certainly could make the decision to sign a guarantee easier for the guarantor, and a predictable source of funds for the creditor should there be a default.

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[151] Stetson, *supra* note 23.

[152] FPC Fin. v. Wood, No. 2006-02-005, 2007 WL 731428, at *6 (Ohio App. 2007) (declining to enforce guarantee because it was not relied upon to make the decision to grant credit).

[153] *See generally* Livonia Bldg. Materials Co. v. Harrison Constr. Co., 742 N.W.2d 140 (2007) (citing multiple cases that note the necessity of the guarantee being part of what was actually bargained for).

[154] *See* Thacker, *supra* note 44.

[155] David Worrell, *Loans Are Fun Again: Finally, Personal Guarantees Are History*, ALLBUSINESS (Jan. 01, 2013), http://experts.allbusiness.com/loans-are-fun-again-finally-personal-guarantees-are-history/8861/#.VFUG_yPD_IU.

[156] *Id.*

[157] *Id.*; Richard Reinis, *Be Wary of Personal Guarantees*, BUSINESSWEEK (June 15, 2011), http://www.businessweek.com/smallbiz/tips/archives/2011/06/be_wary_of_personal_guarantees.html; *How Personal Guarantee Insurance Can Help Business Owners Manage Risk Without Losing Control of Their Assets*, SMART BUS. (May 01, 2012, 12:00 AM), http://www.sbnonline.com/article/how-personal-guarantee-insurance-can-help-business-owners-manage-risk-without-losing-control-of-their-assets-3/?full=1; *Crump Adds Personal Guarantee Insurance*, INS. J. (Dec. 07, 2011), http://www.insurancejournal.com/news/national/2011/12/07/226592.htm.

[158] *Crump*, *supra* note 157.

VI. A STATUTORY ALTERNATIVE TO THE REQUIREMENT OF CONSIDERATION FOR ENFORCEMENT OF A GUARANTEE

A. Pennsylvania Uniform Written Obligations Act, 33 Pa. Stat. § 6

The Pennsylvania Uniform Written Obligations Act, adopted in 1927, was intended to be a replacement to the common law seal, which was a wax blob, usually imprinted with a ring or stamp, used to seal a document shut.[159] This practice dates back to eleventh century England.[160] A writing bearing such a seal indicated an intention of the sealer to be bound, and was enforced regardless of any consideration.[161] Pennsylvania's Act did not actually abolish the seal, but it was specifically intended to eliminate the necessity of consideration when a promise is committed to writing.[162] The Act's definition is clear: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."[163]

While several state statutes establish a presumption of consideration when a promise is evidenced by a writing, no statutes other than Pennsylvania's appear to eliminate the consideration requirement altogether.[164] In theory, this would render moot the issue of consideration for the guarantor when deciding on the enforceability of personal guarantees, in that it allows for a person to make a binding promise, simply by making it clear in a writing that one wishes to be bound.[165] The Act and its premise have been cited as a rationale for guarantee enforcement in several Pennsylvania decisions.[166] However, even this statute may be in jeopardy based on a recent Pennsylvania Superior Court decision.

Socko v. Mid-Atlantic Systems of CPA, Inc. concerns the enforceability of a broad non-compete agreement signed by an employee, entered into after employment had commenced, and without

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[159] Braham, *supra* note 9, at 355.
[160] Brian Madigan, *History of Signing Documents Under Seal*, RE/MAX (Sept. 21, 2012), http://www.remaxwest.com/blog/history-of-signing-documents-under-seal.
[161] *See generally* Braham, supra note 9.
[162] *Id.*
[163] Pennsylvania Uniform Written Obligations Act, 33 Pa. Stat. § 6 (2014).
[164] *See, e.g.*, CAL. CIV. CODE § 1614 (2014); IDAHO CODE ANN. § 29-103 (2014); MONT. CODE ANN. § 28-2-804 (2013); N.D. CENT. CODE ANN. § 9-05-10 (2014); OKLA. STAT. tit. 15, § 114 (2014); S.D. CODIFIED LAWS § 53-6-3 (2014).
[165] Laudig v. Laudig, 624 A.2d 651, 654 (Pa. Super. Ct. 1993) (upholding written post-nuptial promise of fidelity).
[166] *See* E. Elec. Corp. of N.J. v. Shoemaker Constr. Co., 652 F.Supp.2d 599 (E.D. Pa. 2009); Paul Revere Protective Life Ins. Co. v. Weis, 535 F.Supp. 379, 380 (E.D. Pa. 1981).

any additional consideration to that employee.[167] The court, in what it considered a matter of first impression, cited conflicting district court decisions and a Pennsylvania Supreme Court case from 1867 in declining to enforce the agreement, regardless of the fact that it contained the language necessary to comply with the Uniform Written Obligations Act.[168] Petition for Allowance of Appeal was granted in December 2014, with the questions for the court stating that the Superior Court either misconstrued or impermissibly amended the Act.[169]

B. Model Enforceable Promises Act

One proposed solution, along the lines of the Pennsylvania approach, is for states to enact the Model Enforceable Promises Act:[170]

> 1) A written promise [or release] hereafter made, executed, and signed by the person promising (promisor) as provided by this Act, shall be valid and legally enforceable without regard to the absence of consideration or of a seal.
> 2) In the presence of two witnesses, one of whom is a notary public, the promisor shall
>
> a) prior to signing write, or in the presence of the witness direct another to write, the following words on the last page of the writing: "I intend all promises in this writing to be valid and legally enforceable."; and
>
> b) sign, or in the presence of the witnesses direct another to sign, every page of the writing; and
>
> c) personify the writing by impressing a thumbprint or similar personal attribute on every page of the writing.
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> 3) A written promise that satisfies all the formalities of subsection (2) shall be recorded in the office of the Secretary of State in accordance with the procedures followed by the Secretary of State for recording

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[167] Socko v. Mid-Atlantic Sys. of CPA, Inc., 99 A.3d 928, 929 (Pa. Super. Ct. 2014).
[168] *Id.* at 930–36 (citing Surgical Sales Corp. v. Paugh, No. 92-0591, 1992 WL 70415 (E.D. Pa. 1992) (stating that UWOA does not permit enforcement of gratuitous non-compete)); Latuszewski v. Valic Fin. Advisors, Inc., No. 03-0540, 2007 WL 4462739 (W.D. Pa. 2007) (stating that UWOA permits enforcement of a gratuitous non-compete agreement); Gompers v. Rochester, 56 Pa. 194, 197 (1867) (holding that a seal does not support a covenant not to compete).
[169] Socko v. Mid-Atlantic Systems of CPA, Inc., 105 A.3d 659 (Pa. 2014).
[170] Eric Mills Holmes, *Stature and Status of a Promise Under Seal as a Legal Formality*, 29 WILLAMETTE L. REV. 617, 664–67 (1993).

> documents. [The Act may provide different or alternate methods of recording as well as priority rules.]
> 4) A written promise shall be effective and all rights stated therein shall vest in the promisee when the written promise is recorded pursuant to subsection (3). If the writing is so recorded, the promisee's rights are superior to all claims and rights of third persons arising under applicable state statutory law. In the absence of applicable state statutory law, the promisee's rights (if recorded as provided by this Act) are absolute and not subject to any claims or rights of third persons. If the written promise is not recorded as provided by this Act, the promisee's rights as stated in the writing are subject to the applicable common law and state statutes concerning the validity and enforceability of contract rights including claims and rights of third persons, but in no instance shall the promisee be liable for any debt or obligation of the promisor.
> 5) A written promise that satisfies subsections (2) and (3) shall conclusively establish a valid and legally enforceable promise. If subsections (2) and (3) are not completely satisfied, extrinsic evidence of a promisor's intent to create a valid and legally enforceable promise is inadmissible in any action to enforce the promise.[171]

The Model Enforceable Promises Act would enable a person or entity to make a binding written promise, and would also allow someone who cannot write to have another make the writing at her direction and have it be effective.[172] The Act was proposed over twenty years ago, but it has not engendered much support. In light of recent developments in enforcing guarantees, it should be reconsidered for adoption.

VII. CONCLUSION

Personal guarantees are a vital cog in the machinery of small business financing arrangements. It is very difficult to get startup or expansion funds without such a guarantee.[173] Lack of enforceability could force entrepreneurs to give up equity in a fledgling business, in order to obtain necessary funds from an angel investor.[174] Personal

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[171] *Id.* at 667 (internal citations omitted).
[172] *Id.* at 667 nn.247–48.
[173] Thacker, *supra* note 44.
[174] Drew Hendricks, *4 Great Tips for Finding Funding for Your Startup*, FORBES (Oct. 31, 2013, 11:22 AM), http://www.forbes.com/sites/drewhendricks/2013/10/31/4-great-tips-for-finding-funding-for-your-startup/2/.

guarantees enable businesses to get reasonable lease rates on commercial property.[175] Third party guarantees are virtually required on student loans, without which interest rates would rise and availability could dry up.[176]

It seems obvious that some jurisdictions have more hostility towards personal guarantees than others, sometimes searching out any excuse to achieve the "fair" result, even when that process results in conflicting decisions among cases with the same basic fact patterns. This is understandable, especially when the court is faced with a dispute between a sympathetic small business defendant and a large company with substantial negotiating leverage. Until recently, however, no court has disturbed the premise of consideration for a personal guarantee as flowing to the primary obligee of the note or lease. The court in *Tocci* in essence held that consideration must flow directly to the guarantor. As such, this case threatens to undermine the basic doctrine upon which such guarantees are upheld.

Yellow Book v. Tocci and other recent court decisions threaten to undermine the enforceability of personal guarantees and represent a trend that needs to be reversed. The adage "hard cases make bad law" is certainly applicable here. Although one can certainly sympathize with someone in Ms. Tocci's position, the potential ramifications of this decision go far beyond this case. This decision, as well as others, if followed, could lead to reduced access to affordable credit and services for small businesses and consumers. Individuals or companies frequently give personal guarantees, with the benefit of the bargain not flowing directly to those actors, but to the entity receiving credit. As such, this decision puts all donative and non-principal guarantees at risk, at least in the Northern District of Massachusetts, and possibly elsewhere if other jurisdictions find the court's reasoning persuasive.

More precise drafting of personal guarantees, including clear and unambiguous language, is the key to ensuring that guarantors know what they are getting into when they sign their names. If that requires two separate signatures, one each in a corporate and personal capacity, it is a small price to pay, notwithstanding *Yellow Book*'s contentions.[177]

Finally, persons and corporations should be able to make enforceable promises, without having to rely on the legal fiction of nominal consideration, or a twisting of the contract law requirement for consideration. Commerce would be better served by widespread adoption of the Pennsylvania approach to enforcement of promises or enactment of the Model Enforceable Promises Act, which would require

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[175] Lee, *supra* note 54.

[176] *Important Things to Know*, *supra* note 1.

[177] *See* Yellow Book of New York, LP. v. Platt, No. 31073/02, 2003 WL 1389103, at *3–*4 (N.Y. D. Ct. Feb. 3, 2003) (internal citations omitted).

only a written showing of intent to be bound.[178] Either approach could help to ensure predictability in the enforcement of guarantees.[179]

[178] *See* Pennsylvania Uniform Written Obligations Act, 33 Pa. Stat. § 6 (2014).
[179] *See* Holmes, *supra* note 170.